

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1976-FT

Cir. Ct. No. 2009CV1208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ASSOCIATED BANK,

PLAINTIFF-RESPONDENT,

V.

**MILLER HOMES OF HUDSON, LLC, SAMUEL E. MILLER, LEO A.
DRAVELING AND MONICA J. DRAVELING,**

DEFENDANTS-APPELLANTS,

MCCULLOUGH & SONS, INC. AND COUNTRYWIDE BANK, FSB,

DEFENDANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed in part; reversed in part.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Miller Homes of Hudson, LLC, Samuel E. Miller, Leo A. Draveling, and Monica J. Draveling (collectively, Miller Homes) appeal a judgment of foreclosure entered in favor of Associated Bank.¹ The circuit court entered the judgment on May 31, 2012, nunc pro tunc to March 16, 2012. We conclude the court erroneously exercised its discretion by entering the judgment nunc pro tunc. The court therefore erroneously concluded the redemption periods for the subject properties began on March 16, 2012. The redemption periods should have instead begun on May 31, 2012, the date the judgment was actually entered. We therefore reverse the judgment in part.

¶2 Miller Homes also argues the court-appointed receiver for the subject properties should have been required to provide an accounting before the court set the redemption amounts. However, we conclude the court properly exercised its discretion by requiring the receiver to submit an accounting after the sheriff's sale. We therefore affirm the judgment in part.

BACKGROUND

¶3 This case arises out of ten loans Associated made to Miller Homes between August 2005 and September 2008. Each loan was secured by a note and mortgage, and the various mortgages encumbered fourteen different parcels of property. In September 2009, Associated initiated foreclosure proceedings against Miller Homes. On Associated's motion, the court appointed a receiver over the subject properties.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Associated subsequently moved for summary judgment. On March 16, 2012, the court entered a “Memorandum Decision and Order” granting Associated’s motion. The court’s decision concluded that Associated was entitled to a judgment of foreclosure, but the court did not actually enter a foreclosure judgment until May 31, 2012. On that date, the court entered its “Findings of Fact, Conclusions of Law, and Judgment,” which it signed nunc pro tunc to March 14, 2012. The judgment provided that the redemption periods for thirteen of the subject properties would end on September 14, 2012—six months after the nunc pro tunc entry of the judgment.² The redemption period for the fourteenth property would end on March 14, 2013—one year after the nunc pro tunc entry of the judgment.³ The judgment also stated that, after the sheriff’s sale, the receiver would provide the court with an accounting of any rents collected from the subject properties.

¶5 On June 5, 2012, Miller Homes objected to the judgment, asserting the court improperly calculated the redemption periods based on the date the judgment was entered nunc pro tunc. Miller Homes also alleged the court erred by determining the redemption amounts without first requiring the receiver to submit an accounting. The court rejected Miller Homes’ arguments in an order issued June 11, 2012. However, the court revised the judgment so that it was signed nunc pro tunc to March 16, 2012, the date the “Memorandum Decision and Order” was entered, instead of March 14. Accordingly, the court concluded March 16, 2012

² See WIS. STAT. § 846.103(1) (redemption period for commercial properties and multifamily residences ends six months “from the date when judgment is entered”).

³ See WIS. STAT. § 846.10(2) (redemption period for “a one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action” ends twelve months “from the date when judgment is entered”).

was the proper date for the start of the redemption periods, which would therefore end on September 16, 2012 and March 16, 2013, respectively.

DISCUSSION

¶6 Miller Homes first argues the circuit court erred by entering the judgment of foreclosure nunc pro tunc to March 16, 2012 and by calculating the redemption periods using that date. Whether a judgment should be entered nunc pro tunc is within the circuit court’s discretion. *Mikrut v. State*, 212 Wis. 2d 859, 868 n.3, 569 N.W.2d 765 (Ct. App. 1997). We will uphold a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶7 Translated from Latin, nunc pro tunc means “now for then.” BLACK’S LAW DICTIONARY 1100 (8th ed. 2004). “Nunc pro tunc entry is an entry made now of something actually previously done, to have the effect of the former date.” *Schmorrow v. Sentry Ins. Co.*, 138 Wis. 2d 31, 36, 405 N.W.2d 672 (Ct. App. 1987) (italics omitted). A court’s nunc pro tunc authority is limited to rectifying “mechanical errors” in a judgment or order. *Id.* at 36-37. Consequently, a court may enter a judgment nunc pro tunc only to “conform ... [the] judgment to that actually pronounced.” *Id.* at 37. The test is whether nunc pro tunc entry “will make the record speak the truth as to what was actually determined or done” *Strawser v. Strawser*, 126 Wis. 2d 485, 490, 377 N.W.2d 196 (Ct. App. 1985) (quoting *State ex rel. Kruletz v. District Court*, 98 P.2d 883, 885 (Mont. 1940)). Thus, “a nunc pro tunc order is only valid for the purpose of correcting the judicial record, not altering it[.]” *Id.* at 487.

¶8 Here, the circuit court entered its “Findings of Fact, Conclusions of Law, and Judgment” nunc pro tunc to the date of the “Memorandum Decision and Order” that granted Associated summary judgment. The court reasoned it was proper to enter the judgment nunc pro tunc because the earlier decision and order had “resolved all issues pertaining to ‘Miller Homes.’” In essence, the court concluded that the judgment simply memorialized the court’s earlier summary judgment ruling, and, as a result, entering the judgment nunc pro tunc would not alter the judicial record. We disagree with the court’s conclusion.

¶9 The “Memorandum Decision and Order” merely expressed the court’s legal conclusion that Associated was entitled to summary judgment on its foreclosure claim. In contrast, the court’s “Findings of Fact, Conclusions of Law, and Judgment” outlined both parties’ rights and obligations in light of that conclusion. For instance, the judgment set forth the amounts Miller Homes owed Associated on the various loans, the redemption periods for the subject properties, and Associated’s right to a deficiency. The judgment also provided that each of the fourteen parcels could be sold individually, and it described the manner in which notice of the sheriff’s sales would be given. Additionally, the judgment enjoined Miller Homes from committing waste and ordered the receiver to provide an accounting of any rents collected. These provisions went far beyond the terms of the “Memorandum Decision and Order.” Thus, entering the judgment nunc pro tunc to the date of the decision and order did more than simply correct the judicial record or “conform ... [the] judgment to that actually pronounced.” *See Schmorrow*, 138 Wis. 2d at 37. Instead, it altered the judicial record by making retroactive to March 16 obligations that the court did not actually impose until May 31. Nunc pro tunc entry may not be used to alter the judicial record. *Strawser*, 126 Wis. 2d at 487.

¶10 Associated cites three cases for the proposition that “Wisconsin courts have routinely entered judgments nunc pro tunc, including in the mortgage foreclosure context.” See *Alsmeyer v. Norden*, 30 Wis. 2d 593, 141 N.W.2d 177 (1966); *Gibson v. Madison Bank & Trust Co.*, 7 Wis. 2d 506, 96 N.W.2d 859 (1959); *Helmrick v. Helmrick*, 95 Wis. 2d 554, 291 N.W.2d 582 (Ct. App. 1980). While that may be true, it does not necessarily follow that nunc pro tunc entry was proper in this instance. Indeed, the cases Associated cites are distinguishable.

¶11 In *Alsmeyer*, 30 Wis. 2d at 594, the circuit court entered a judgment of foreclosure nunc pro tunc to the date it issued findings of fact and conclusions of law. Conversely, the circuit court in this case entered its “Findings of Fact, Conclusions of Law, and Judgment” nunc pro tunc to a “Memorandum Decision and Order” that merely concluded Associated was entitled to summary judgment. Accordingly, the situation here is not analogous to the one in *Alsmeyer*. Moreover, because the *Alsmeyer* court dismissed the appeal as untimely, it never addressed whether nunc pro tunc entry of the foreclosure judgment was proper. See *id.*

¶12 Associated’s reliance on *Gibson* is similarly unavailing. There, our supreme court concluded the circuit court properly “amend[ed] a judgment nunc pro tunc that was to cover three consolidated [foreclosure] cases but only covered the subject matter of one.” *Gibson*, 7 Wis. 2d at 515. Error correction is a proper use of a court’s nunc pro tunc authority. *Schmorrow*, 138 Wis. 2d at 36-37. Unlike the court in *Gibson*, though, the circuit court in this case did not use its nunc pro tunc authority to correct any error.

¶13 The issue in *Helmrick*, 95 Wis. 2d at 556, was whether an appeal should be dismissed as untimely. When reciting the procedural history of the case,

this court noted that the circuit court had entered a foreclosure judgment on “November 3, 1977, nunc pro tunc August 15, 1977[.]” *Id.* at 555. However, we did not explain why the judgment was entered nunc pro tunc. Moreover, because we concluded the appeal was untimely, we did not address the propriety of the nunc pro tunc entry. *Helmrick* therefore provides no support for Associated’s position that the circuit court in this case properly entered the foreclosure judgment nunc pro tunc.

¶14 Therefore, we conclude the court erred by entering the foreclosure judgment nunc pro tunc to March 16, 2012. As a result, the court improperly determined that the redemption periods for the subject properties began on that date. The redemption periods should have instead begun on May 31, 2012, the date the foreclosure judgment was actually entered.⁴ *See* WIS. STAT. §§ 846.10(2), 846.103(1) (redemption periods are calculated “from the date when judgment is entered”). We therefore reverse that portion of the judgment stating that the redemption periods would end on September 16, 2012 and March 16, 2013, respectively. Instead, the six-month redemption period for parcels one through thirteen ended November 30, 2012, and the one-year redemption period for parcel fourteen will end on May 31, 2013. Miller Homes asserts a sheriff’s sale has already been held for parcels one through thirteen. If that sale occurred before November 30, 2012, it is void.

⁴ Miller Homes suggests on appeal that the redemption periods may not have begun until June 11, 2012, the date the court issued its order rejecting Miller Homes’ challenge to the judgment and correcting certain errors. However, Miller Homes cites no authority for its argument that the redemption periods may have begun on June 11. We do not consider arguments that are undeveloped or unsupported by legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶15 Next, Miller Homes argues the circuit court erred by setting the redemption amounts for the subject properties without first requiring the court-appointed receiver to provide an accounting. We conclude the court properly exercised its discretion by requiring the receiver to submit an accounting after the sheriff's sale. See **GMAC Mortg. Corp. v. Gisvold**, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998) ("Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings."); see also **Harrigan v. Gilchrist**, 121 Wis. 127, 253, 99 N.W. 909 (1904) (As a general matter, a court "may compel the receiver to account at any time, and in any manner it sees fit, not transcending the limits of judicial discretion[.]").

¶16 Miller Homes cites no authority for its argument that the court was required to order an accounting before it set the redemption amounts. Instead, Miller Homes contends that, without an accounting, the redemption amounts were inaccurate, and Miller Homes did not know how much it needed to pay to redeem the properties. However, as Associated points out, "the very nature of the mortgage foreclosure process does not allow for the precise redemption amount to be set in a foreclosure judgment." Associated correctly notes that, after a foreclosure judgment is entered, the redemption amount will change as interest accrues on the judgment and as the receiver continues to collect rents and other income. Consequently, Associated argues that requiring the receiver to submit an accounting before the court sets the redemption amount is unnecessary because the receiver will inevitably have to provide a second accounting later on. Miller Homes does not respond to Associated's argument. Arguments not refuted are deemed conceded. See **Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.**, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶17 Furthermore, to the extent Miller Homes argues that the circuit court's failure to order an accounting prevented it from redeeming the properties before the sheriff's sale, Associated notes that a mortgagor's right of redemption extends beyond the date of the sheriff's sale, until the sale is confirmed. *See Security State Bank v. Sechen*, 2005 WI App 253, ¶¶8-9, 288 Wis. 2d 168, 707 N.W.2d 576 (citing *Gerhardt v. Ellis*, 134 Wis. 191, 195, 114 N.W. 495 (1908)). Thus, Associated contends the court's failure to order an accounting before the sheriff's sale did not prevent Miller Homes from exercising its right of redemption. Again, Miller Homes fails to respond to Associated's argument, and we therefore deem it conceded. *See Charolais Breeding Ranches*, 90 Wis. 2d at 109. Miller Homes simply has not convinced us that the circuit court erroneously exercised its discretion with respect to the timing of the accounting.

¶18 Neither party shall receive appellate costs. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Judgment affirmed in part; reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

